

**BEFORE  
THE PUBLIC SERVICE COMMISSION  
OF SOUTH CAROLINA  
DOCKET NO. 2016-89-E**

IN RE: )  
Lily Solar LLC, )  
 )  
Complainant/Petitioner, )  
vs. )  
 )  
South Carolina Electric & Gas Company, )  
 )  
Defendant/Respondent. )  
\_\_\_\_\_ )

**COMPLAINANT'S RETURN  
IN OPPOSITION TO  
DEFENDANT'S MOTION TO  
DISMISS**

**I. INTRODUCTION**

Lily Solar LLC, (hereinafter, "Lily Solar", acting through its representatives), filed a formal Complaint in this Docket against the Defendant/Respondent South Carolina Electric & Gas Company, (hereinafter, "Defendant/Respondent"), on February 26, 2016. On April 4, 2016, Defendant/Respondent filed an Answer and a Motion to Dismiss Lily Solar's Complaint. Thereafter, Lily Solar sought a date certain to return to Defendant/Respondent's Motion to Dismiss. Lily Solar's request was consented to by the Defendant/Respondent and an Order was issued by the Standing Hearing Officer, the Honorable Joseph Melchers, dated April 14, 2016, by Order No. 2016-36-H, granting Lily Solar's request that its Return to Defendant/Respondent's Motion be filed on April 29, 2016. Lily Solar's Return follows.

**II. APPLICABLE COMMISSION ORDERS**

(See, Appendix "B", hereto, for quotes from cited Orders)

This Commission Requires Defendant/Respondent to Negotiate in Good Faith.

See, Appendix "B" hereto, for quotes from "3" Commission Orders, **Order No. 81-214**, **Order No. 85-347**, and **Order No. 89-56**.

This Commission Encourages Aggrieved Parties to File a Formal Complaint.

See, Appendix "B" hereto, for quote from Commission **Order No. 85-347**.

### III. APPLICABLE LAW

#### Rule 12(b)(6), SCRCP.

Defendant/Respondent's 12(b)(6) Motion is without merit and the relief sought should be denied.

A 12(b)(6) Motion may not be granted if the Pleadings, viewed in the light most favorable to the Plaintiff, and the inferences drawn therefrom, show that the Plaintiff could prevail on a theory of the case. Gray v. State Farm Auto Ins. Co., 491 S.E.2d 272, 274-75 (Ct. App. 1995); Burns v. Gardner, 493 S.E.2d, 356, 359 n.2 (Ct. App. 1997). "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper." Bergstrom v. Palmetto Health Alliance, 358 S.C. 388, 395, 596 S.E.2d 42, 45 (2004).

"All properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." Hambrick v. GMAC Mortg. Corp., 634 S.E.2d 5, 7 (Ct. App. 2006). "The question is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Mr. G v. Mrs. G, 465 S.E.2d 101, 105 (Ct. App. 1995), (Dissent, Hearn, J.). The Complaint may not be dismissed simply because the Court doubts the Plaintiff will prevail in the action. Flateau v. Harrelson 584 S.E. 2d 413, 415-16 (Ct. App. 1993). "Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." HHHunt Corp. v. Town of Lexington, 699 SE 2d 699, (Ct. of App. 2010).

#### Contract Law.

South Carolina Law is clear on the point that even when the parties fail to execute a contemplated memorial of their agreement, they can be bound by a Contract. Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 764 (D.S.C. 1999); Bugg v. Bugg, 249 S.E.2d 505, 507-08 (S.C. 1978).

Specifically, under the facts of this matter, the final tender of a Large Generator Interconnection Agreement would merely serve to memorialize the Contract between Lily Solar and Defendant/Respondent. **In such cases the question is one of objectively expressed intent, which is a question of fact that cannot be resolved on a Motion to Dismiss.** Tindall Corp. v. Mondelez Int'l Inc., 2015 WL 996847 (N.D. Ill.) (S.C. Law), (Emphasis supplied).

#### IV. FACTS

(See, Appendix "A" hereto, for facts)

#### V. SUMMARY OF ARGUMENT IN RETURN

##### Lily Solar's Complaint is not Vague and Insufficient.

Lily Solar's Complaint is well supported by the dates and details of Defendant/Respondent's offer, pursuant to Defendant/Respondent's Large Generator Interconnection Procedures, which will be disclosed by proper discovery in this matter, after this Motion is resolved. Lily Solar's submission and payment of considerable consideration supported a Large Generator Interconnection Agreement and Defendant/Respondent's legally enforceable obligation to provide a Large Generator Interconnection Agreement to Lily Solar. Defendant/Respondent proposed and is a signatory to, a Scheduling Order from this Commission, Order No. 2016-40A-H, which anticipates a time frame through June 13, 2016, for discovery to be conducted by these parties. Obviously that discovery period will be important to Lily Solar to document specific meetings and document exchanges that occurred in this matter.

It is important to note that, Defendant/Respondent has removed its Large Generator Interconnection Procedures document, from Defendant/Respondent's OASIS site, as of this writing and it will be crucial for Lily Solar to obtain the LGIP that was in effect in the time frame leading up to January 14, 2016, improper offer by Defendant/Respondent, by way of discovery that Lily Solar must be allowed to conduct in this matter, to support Lily Solar's Complaint. See, details on paragraphs, "1", "2", "6", "8", "9" and "10", of Lily Solar's Complaint. (See, full argument on pages 5-6).

Lily Solar's Complaint is **not Moot**.

Lily Solar's Complaint against Defendant/Respondent, is not moot. Defendant/Respondent, through its Counsel, agreed in writing<sup>1</sup> to preserve Lily Solar's "interconnection queue position", as of January 14, 2016. Further, Lily Solar's legal counsel pled relief in Lily Solar's Complaint page "6", requesting, "That this Commission's decision should restore Lily Solar *nunc pro tunc* to its Contract position at the time of [Defendant/Respondent's] improper offer on or about January 14, 2016." Therefore, this Commission should grant relief restoring Lily Solar's Contract position and rights, as of January 14, 2016, which date predates the Order cited by Defendant/Respondent for its claim that Lily Solar's Complaint is moot, namely, March 9, 2016.

South Carolina considers the Restatement (Second) of Contracts as authoritative and gives us guidance in this matter. Namely, Defendant/Respondent's mootness argument is predicated on a Directive Order of this Commission. Defendant/Respondent claims that that Directive Order renders it impossible for Defendant/Respondent to perform its contract obligation to tender a LGIA to Lily Solar. However, in order to raise the impossibility defense Defendant/Respondent must be without fault in creating the event that made Defendant/Respondent's performance impossible. §261 Restatement (Second) Contracts. Defendant/Respondent was complicit in obtaining the Directive Order from this Commission and therefore Defendant/Respondent is not without fault in creating the event that Defendant/Respondent attempts to rely upon.

It is uncontroverted, that if Defendant/Respondent had tendered the required Large Generator Interconnection Agreement, on or about, January 14, 2016, consistent with the Legally Enforceable Obligation that was formed between the parties to this Complaint, the issuance of the March, 2016, Order in Commission Docket 2015-362-E, would not have affected Lily Solar's rights and the enforceability of that Large Generator Interconnection Agreement. (See, full argument on pages 6-8).

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<sup>1</sup> By electronic mail to Lily Solar's legal counsel, dated March 4, 2016, at 3:46 p.m., which is incorporated herein by reference.

Lily Solar's Contract Claim is **Well Supported**.

Had Defendant/Respondent tendered a conforming LGIA, the LGIA would have incorporated the parties' prior agreements and specified all material terms of the Interconnection Agreement. The execution of the LGIA would merely serve as a written memorial of the parties' Contract. South Carolina Law is clear on the point that even when the parties fail to execute a contemplated memorial of their agreement, they can be bound by a Contract. Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 764 (D.S.C. 1999); Bugg v. Bugg, 249 S.E.2d 505, 507-08 (S.C. 1978). (See, full argument on page 8).

Defendant/Respondent Required to Negotiate in **Good Faith**.

This Commission's Orders, Order No. 81-214, Order No. 85-347, and Order No. 89-56, required Defendant/Respondent to negotiate in good faith with Lily Solar. Defendant/Respondent did not act in good faith in the negotiations described in more detail, herein.

**VI. ARGUMENT IN RETURN**

Lily Solar returns to Defendant/Respondent's arguments, *seriatim*.

1. **Defendant/Respondent argues**, "The Complaint in this matter is impossibly vague and does not set forth an identifiable claim for relief."

Lily Solar's Complaint is not vague and Lily Solar's Complaint sets forth a specific claim for relief, on page "6" of Lily Solar's Complaint. Representatives of Defendant/Respondent and Lily Solar held an initial scoping meeting on March 3, 2015. At that meeting Defendant/Respondent expressly agreed that it would follow the Large Generator Interconnect Procedures ("LGIP") then posted on Defendant/Respondent's Open Access Transmission Tariff ("OATT") in considering Lily Solar's project. Moreover, at that meeting Defendant/Respondent also expressly agreed that upon successful completion of that process, Defendant/Respondent would tender Lily Solar a large Generator Interconnect Agreement ("LGIA") conforming to the *pro forma* LGIA then posted on Defendant/Respondent's OATT.

The parties' conduct following this meeting leaves no doubt that the parties entered into this agreement. For the next ten months the parties followed Defendant/Respondent's LGIP. For example, Lily Solar funded and Defendant/Respondent performed the Generator Interconnection System Impact Study and the Generator Interconnection Facilities Study required under Defendant/Respondent's LGIP.

Moreover, Lily Solar performed its final obligation under Defendant/Respondent's LGIP when it submitted its comments upon Defendant/Respondent's draft Interconnection Facilities Study Report. Under Defendant/Respondent's LGIP that submission obligated Defendant/Respondent to tender a draft LGIA that conformed to the *pro forma* LGIA post on Defendant/Respondent's OATT.

2. **Defendant/Respondent argues**, "...such claim is moot pursuant to *IN RE: Joint Application of Duke Energy Carolinas, LLC, Duke Energy Progress, LLC and South Carolina Electric & Gas Company for Approval of the Revised South Carolina Interconnection Standard*, Docket No. 2015-362-E."

Lily Solar's Queue Position is Preserved, as of January 14, 2016.

Lily Solar's Complaint against Defendant/Respondent, is not moot. Defendant/Respondent, through its Counsel, agreed in writing to preserve Lily Solar's "interconnection queue position", as of January 14, 2016. Further, Lily Solar's legal counsel pled relief in Lily Solar's Complaint, requesting, "That this Commission's decision should restore Lily Solar *nunc pro tunc* to its Contract position at the time of Defendant/Respondent's improper offer on or about January 14, 2016." Therefore, this Commission should grant relief restoring Lily Solar's Contract position and rights, as of January 14, 2016, which date predates the Order cited by Defendant/Respondent for its claim that Lily Solar's Complaint is moot, namely, March 9, 2016.

Defendant/Respondent's Reliance on Impossibility is Improper.

Defendant/Respondent's mootness argument is predicated on a Directive Order of this Commission. Defendant/Respondent claims that that Directive Order renders it impossible for Defendant/Respondent to perform its contract obligation to tender a LGIA to Lily Solar. However, in order to raise the impossibility defense, Defendant/Respondent must be without fault in creating the event that Defendant/Respondent claims made Defendant/Respondent's performance impossible. Restatement (Second) Contracts §261. Defendant/Respondent has been ordered by this Commission to negotiate in good faith, by the Commission Orders cited in Appendix "B" hereto, cannot seek and be a signatory to a change in the Law, in a "clumsy" attempt<sup>2</sup> to avoid the Legally Enforceable Obligation between Defendant/Respondent and Lily Solar, by claiming impossibility.

Defendant/Respondent's contractual obligation to tender a LGIA to Lily Solar was not discharged by the Commission's issuance of the March 9, 2016, Directive Order establishing a revised South Carolina Interconnection Standard. Defendant/Respondent actively sought the Directive Order from this Commission cited by Defendant/Respondent, while it was under an obligation to tender the LGIA and with full knowledge that the then-proposed S.C. Standard was inconsistent with the terms of the LGIA. Moreover, Defendant/Respondent could have, but did not, seek an exception from the Directive Order from this Commission, to allow Defendant/Respondent to tender the LGIA. By attempting to deprive Lily Solar of the fruits of the contract, Defendant/Respondent's conduct constituted a breach of Defendant/Respondent's contractual obligation to perform in good faith. See, Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E.2d 163, 167 (N.Y. 1933). Moreover, this conduct precludes Defendant/Respondent from relying upon this Commission's Directive Order in an attempt to discharge its obligation to Lily Solar.

It is black letter law that if a party seeking a discharge of a contractual obligation on grounds of impossibility contributed to its own inability to perform, the discharge will be denied. Restatement (Second) Contracts §261<sup>3</sup>; 6 *Corbin on Contracts* 206 (Rev. Ed. 2010). In addition, "contracting parties owe a duty to take all steps reasonably necessary to ensure performance, including the prevention of interference by a third party..." That a principle has been applied to preclude an impossibility defense, based upon an administrative order or regulation.

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<sup>2</sup> The rubric of Docket No. 2015-362-E, includes Defendant/Respondent as a named Applicant.

<sup>3</sup> South Carolina Courts recognize the Restatement (Second) Contract as authoritative.

For example, one court has held that for a utility to assert **a Public Service Commission Order** as a basis for rendering performance of a contract unenforceable on grounds of impossibility the utility must establish that the Order, “was vigorously challenged by diligent efforts of the promisor [the utility] to avoid the consequences of impossibility.” J.J. Cassone Bakery, Inc. v. Consolidated Edison Company of New York, Inc., 638 N.Y.S.2d 898, 904 (Sup. Ct. 1996), (reversed on other grounds).

In another decision, the court held that a promisor’s failure to seek exception from a FHA rule precluded impossibility defense. Agway, Inc. v. Marotti, 540 A.2d 1044 (Vt. 1988). In any event, whether Defendant/Respondent’s conduct precluded its reliance upon an injunction as grounds for a discharge of its obligation on grounds of impossibility presented an issue of fact that could not be resolved on a motion to dismiss. See, Lowenschuss v. Kane, 520 F.2d 255 (2d. Cir. 1973).

3. **Defendant/Respondent argues**, “...Lily Solar's attempt at a breach of contract claim is conclusory and unsupported by South Carolina law.”

A Contract was agreed to by the parties to this Complaint and this was not a factual situation, in which the parties “agreed to agree” upon a Large Generator Interconnection Agreement, but one under which Defendant/Respondent was obligated to tender an LGIA conforming to the *pro forma* LGIA posted on Defendant/Respondent’s OATT. Had Defendant/Respondent tendered a conforming LGIA, that conforming LGIA would have incorporated the parties’ prior agreements and specified all material terms of the Interconnection Agreement. The execution of the LGIA would merely serve as a written memorial of the parties’ Contract. South Carolina Law is clear on the point that even when the parties fail to execute a contemplated memorial of their agreement, they can be bound by a Contract. Sadighi v. Daghighfekr, 66 F. Supp. 2d 752, 764 (D.S.C. 1999); Bugg v. Bugg, 249 S.E.2d 505, 507–08 (S.C. 1978). In such cases the question is one of objectively expressed intent, which is a question of fact that cannot be resolved on a Motion to Dismiss. Tindall Corp. v. Mondelez Int’l Inc., 2015 WL 996847 (N.D. Ill.) (S.C. Law). Inherent in Lily Solar’s Complaint, is Lily Solar’s rights by Promissory Estoppel and Detrimental Reliance.

**4. Defendant/Respondent is Required to Negotiate in Good Faith.**

This Commission's Orders, Order No. 81-214, Order No. 85-347, and Order No. 89-56, required Defendant/Respondent to negotiate in good faith with Lily Solar. Defendant/Respondent did not act in good faith in the negotiations described in more detail, herein. (See, Appendix "B" hereto, for complete quotes from Commission Orders.)

**VII. CONCLUSION**

Defendant/Respondent's Motion is without merit and the relief sought should be denied.

Respectfully Submitted,  
/S/

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April 29, 2016  
Columbia, South Carolina

## **APPENDIX “A”**

### **(Facts)**

Lily Solar, as an Interconnection Customer, proposed to develop and interconnect a Large Generating Facility, as defined by its nameplate capacity size under both FERC and Defendant/Respondent’s Large Generator Interconnection Procedure, consistent with Defendant/Respondent’s approved Open Access Transmission Tariff (hereinafter, “OATT”). Lily Solar submitted an Interconnection Request to Defendant/Respondent on or about February 16, 2015, to initiate the application process. Lily Solar, as the Interconnection Customer, sought interconnection service from its facility with Defendant/Respondent’s Transmission System and was told by Defendant/Respondent’s Representatives that the study process and agreements would follow Defendant/Respondent’s Large Generator Interconnection Procedure in alignment with Defendant/Respondent’s OATT.

Lily Solar, proposed a 70 MW Solar Large Generating Facility, with a physical “footprint” of over 625 acres. Lily Solar would have provided a nominal economic impact of more than \$85 million of new capital investment sited in Allendale County, South Carolina. Lily Solar would have been one of the first Large-Scale Solar Generating Facilities by an independent power producer in South Carolina seeking access to Defendant/Respondent’s transmission system as a Large Generating Facility. Upon completion of construction, Lily Solar would have provided significant discretionary property tax income to Allendale County, along with delivering on-peak power to serve South Carolina ratepayers when they needed it the most.

Lily Solar was recently touted by Governor Nikki Haley in a press release dated January 27, 2016. Lily Solar was also praised by Secretary of Commerce Bobby Hitt. Finally, Lily Solar was welcomed to Allendale County, South Carolina by Allendale County Councilman Mr. James Pinkney.

Lily Solar, as the Interconnection Customer and in compliance with Defendant/Respondent’s direction, timely submitted each Interconnection Agreement and financial deposit, as required by Defendant/Respondent and in compliance with Defendant/Respondent’s Large Generator Interconnection Procedure, as directed by Defendant/Respondent, in seeking interconnection Service. Defendant/Respondent’s communication to Lily Solar’s representatives referenced compliance under Defendant/Respondent’s OATT when tendering application agreements that also comport with OATT Large Generator Interconnection Procedure. Specifically, Lily Solar invested \$160,000, in deposits with Defendant/Respondent in connection with advancing its Interconnection Application over the course of more than ten months in seeking access to Defendant/Respondent’s transmission system.

## **APPENDIX “A”, (Cont.)**

Lily Solar also made an additional substantial financial investment in negotiating and executing a mutually acceptable Fee in Lieu of Taxes Agreement, (hereinafter, “FILOT”), with Allendale County, South Carolina with a 30 year term.

Defendant/Respondent communicated to Lily Solar’s representatives the contractual responsibilities and framework to obtain interconnection and how Defendant/Respondent would follow Defendant/Respondent’s Large Generator Interconnection Procedure in compliance with its OATT throughout the process. Defendant/Respondent, as the Interconnection Provider, has at all times relevant to this Complaint, offered (and Lily Solar accepted and complied with) Large Generator Interconnection Studies tendered by Defendant/Respondent inclusive of the deposits and timelines as directed and referenced by Defendant/Respondent, consistent with Defendant/Respondent’s Large Generator Interconnection Procedure as published under its OATT. Furthermore, Defendant/Respondent complied with the Large Generator study timelines and deposit framework in analyzing Lily Solar’s Interconnection Application as specified in their OATT. More specifically, Defendant/Respondent indicated to Lily Solar representatives that it would follow Defendant/Respondent’s Large Generator Interconnection Procedures and tender a conforming Large Generator Interconnection Agreement as represented in Defendant/Respondent’s Large Generator Interconnection Procedure published under Defendant/Respondent’s Open Access Transmission Tariff.

After completion of the Large Generator Interconnection Studies, discussions between the parties, the passage of considerable time and after an exchange of electronic communications/documents, Defendant/Respondent inexplicably offered an inferior alternative to Defendant/Respondent’s Large Generator Interconnection Agreement titled “Generator Interconnection Agreement”, instead of an OATT compliant “Large Generator Interconnection Agreement” as agreed upon, understood, and paid for by Lily Solar. The Generator Interconnection Agreement offered by Defendant/Respondent is more consistent with a Small Generator Project (which would be 20 MW, or less), is inconsistent with the 70 MW Large Generating Facility envisioned by Lily Solar, lacks key commercial terms comparable to the Large Generator Interconnection Agreement and is materially different from the form of contract that was consistently mentioned by both parties in negotiations, prior to Defendant/Respondent’s submission of the alternative Generator Interconnection Agreement. As such, Defendant/Respondent did not contractually perform its obligation to Lily Solar and Lily Solar should be afforded all of the rights and benefits that Defendant/Respondent’s Large Generator Interconnection Agreement provides comporting with contract law.

## **APPENDIX "A", (Cont.)**

At the Hearing in this matter, Lily Solar's representatives will produce electronic mail communications/documents, which will show that all of Defendant/Respondent's discussions, exchange of documents and deposits reference (i) Defendant/Respondent's Open Access Transmission Tariff (ii) a Large Generating Facility (iii) Defendant/Respondent's Large Generator Interconnection Procedure and (iv) Defendant/Respondent's Large Generator Interconnection Agreement, which taken together, constitute overwhelming evidence of an offer by Defendant/Respondent and an acceptance by Lily Solar, of the requirement for Defendant/Respondent to tender a Large Generator Interconnection Agreement in conformance with their OATT.

As stated, Defendant/Respondent offered and Lily Solar accepted, a Large Generator Interconnection Procedure as the contractual framework to obtain a Large Generator Interconnection Agreement, conforming with Defendant/Respondent's Large Generator Interconnection Procedure. Furthermore, Lily Solar detrimentally relied on Defendant/Respondent's Large Generator Interconnection offer. Finally, a legally enforceable contract obligation to provide an OATT compliant Large Generator Interconnection Agreement occurred upon Defendant/Respondent's offer and Lily Solar's acceptance.

Defendant/Respondent's improper offer of an alternative and inferior Generator Interconnection Agreement came after the tremendous financial investment and reliance by Lily Solar, in the Interconnection Process, in obtaining Lily Solar's mutually acceptable FILOT with Allendale County, and inclusive of advancing development of the proposed Large Generator. Defendant/Respondent's alternative Generator Interconnection Agreement places additional economic burden on Lily Solar which likely results in the project becoming uneconomic. If Defendant/Respondent were to succeed, the barriers of entry would likely result in lost economic investment for Allendale County and NARENCO.

**APPENDIX “B”**  
**(Quotes from Cited Orders)**

“...affected utilities should be encouraged to negotiate with qualifying facilities, especially larger facilities, to reach voluntary agreements for the purchase of electric energy produced by the qualifying facility...” Commission Order No. 81-214, pg. 18, (emphasis added).

“...long term rates shall not be mandated by the Commission, but CP&L, Duke, SCE&G, and existing and future QF’s are encouraged to negotiate in good faith to reach voluntary agreements for the purchase of electric energy.” Commission Order No. 85-347, pg. 37, (emphasis added). Also see, pg. 26 of Order No. 85-347.

“...long term rates should not be dictated but the Commission encourages good faith negotiation.” Commission Order No. 89-56, pg. 15, (emphasis added).

Further this Commission has encouraged that, in circumstances where agreement cannot be reached, for the aggrieved party to present the issue for resolution before this Commission, by way of a formal Complaint. See, on page 28 of Commission Order 85-347, dated August 2, 1985, Docket No.: 80-251-E.